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FUSION FOLK: A COMMENT ON LAW AND MUSIC

Carol Weisbrod*

"If one seeks to get a closer look at a rainbow," Adorno wrote, "it disappears." And of "all the arts, music is the prototypical example of this: It is at once completely enigmatic and totally evident. It cannot be solved, only its form can be deciphered"¹

Whatever the meaning of its complexity and whatever the answers are to its final mystery, music has provided and can continue to provide significant metaphors for law. It is precisely because the structures and forms of music can be analyzed and deciphered that a metaphoric use is possible in other fields.

The Article consists of two parts. Part I reviews some general questions about law and music and considers a number of "forms of music"² that have been found to be useful metaphors in other fields. Part II of the Article focuses on law and on the folk song in the high culture represented by both law and music. Allen Kamp has discussed Karl Llewellyn's work in commercial

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Some of the research for this piece was done in January 1998, when I was a fellow at the Centre for Studies in Religion and Society at the University of Victoria. I would like to thank Harold Coward, Director of the Centre, for his encouragement of this project on pluralism. Judith White of the music library of the University of Victoria provided critical research assistance as did Andrea Joseph, law library of the University of Connecticut. Thanks also to Carolyn Jones, Richard Kay, John McLaren, Thomas Morawetz, Aviam Soifer, Mark Sheingorn, Eva Weisbrod, and David Weisbrod. The examples in this Article, whether from music or law, are simply those of which I happen to know. Other examples might be given for the same point. There is no claim that these examples represent anything statistical as to music or law.

The musical examples used at the Symposium illustrated the argument for the utility of polyphony as a metaphor for law. A quotation from Beethoven's *An Die Ferne Geliebte* set up the idea of variation within a homophonic and traditional harmonic scheme. Beethoven's setting of *Oh! Who, My Dear Dermot* illustrated a more polyphonic approach. Britten's *Avenging and Bright*, the same traditional melody with a different text, represented the idea of "development of doctrine." The sixteenth-century keyboard piece *My Lady Carey's Dump* was juxtaposed with John Renbourn's variations to illustrate the idea of fusion folk.

This Article is for *Music and Art* '55.

¹ THEODORE W. ADORNO, AESTHETIC THEORY 122 (Greta Adorno & Robert Tiedman eds. & Robert Hullot-Kantor trans., 1997).

² See DONALD FRANCIS TOVEY, THE FORMS OF MUSIC (1956).

law (including, of course, the Uniform Commercial Code ("UCC")) in terms of the folk song. "[F]olk art based on tradition, such as the folk song, had value and authenticity."³ Kamp also suggests: "Like the folk songs, merchant practices have evolved."⁴ The question in Part II is: How does the official system, or the high culture, deal with unofficial, or folk, materials.

One answer to that question might be the one given by Plato. Plato argued in *The Laws* for unison, urging that training in music should result in a situation in which the whole community may come to voice always one and the same sentiment in song, story, and speech.⁵

We have moved away from unity or unison as a goal toward something called *harmony*. We even want to be in harmony with some who remain committed to the goal of unity. Thus, we speak sometimes of wanting a pluralism which will tolerate some who are themselves not tolerant of plural approaches. Both the Platonic and the pluralist ideas are expressed as musical metaphors, Plato's "unison" and our "harmony."

To the extent that uniformity, or musical unison, is required, the folk culture, taken as the deviant culture, will tend to be ignored, or suppressed. But if some recognition is to be accorded the sub-culture, we still have a question as to the form of such recognition. This question is explored in the Article through an analogy to the treatment of folk tunes in the art song tradition, focusing particularly on some Beethoven settings, and drawing on categories suggested by Charles Rosen in a discussion of folk music in the works of Baroque and classical composers.⁶

The Article is, in its most general sense, a critique of the idea of autonomy which is common in the understanding of both law

³ Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 357 (1995).

⁴ *Id.* Kamp's footnote reads:

Karl N. Llewellyn, *Folksong* 1-2 (unpublished manuscript, on file with the *Albany Law Review*). Llewellyn wrote: "The essence of a folk song: that it shall, over some period, have been *sung*, and have been transmitted by tradition. . . . Folk song that seems most lasting, sweet to recur, has simplicity, depth, straightness, and deals with vital emotions."

Id. at 357 n.147.

⁵ See PLATO, *THE LAWS OF PLATO* (Thomas L. Pangle ed. & trans., Basic Books 1980).

⁶ See CHARLES ROSEN, *THE CLASSICAL STYLE: HAYDN, MOZART, BEETHOVEN* (1972).

and music. The idea of the autonomy of law, as an enterprise with its own rules and its own conventions, is parallel to a view of the composer, working alone, uninfluenced by what has gone before, creating masterpieces free of cultural contexts. The stress here is on the point that there is a sociological or anthropological question in both of these enterprises, so that both build on previous material, official and unofficial, and that in both there are latitudes and boundaries, ways in which the interpreter is free and ways in which the composer is constrained.

I. THE FORMS OF MUSIC AS METAPHORS

A review of the work relating law and music was offered in 1994 by Bernard Hibbits: "Some scholars," he wrote, "have merely toyed with the metaphor . . . hoping perhaps to humanize law in the process. Others have offered more thoughtful explorations of the similarities between the genres." He provides a useful summary:

Peter Teachout and Robert Abrams have likened legal and musical composition, while John Hart Ely and John Calmore have contemplated the metaphorical links between jazz and constitutional law and critical race theory respectively. Sanford Levinson and J.M. Balkin have explored the connection between the "authentic performance" theory of early music and certain styles of legal interpretation (in particular, constitutional originalism). Jerry Phillips has lately suggested that we approach law as metaphoric "ornamentation," i.e., the spontaneous embellishment of a set musical score. While all this has been happening, metaphoric references to "harmony" and "dissonance" in the titles of university law review articles have increased significantly.⁸

If we say that law is an art, and try to compare it to the art of music⁹—perhaps moving into the area of simile, rather than metaphor—what kinds of things can we say? First, that both have theoretical and practical aspects.¹⁰ Second, perhaps, that there is, in both, a script. In both, the script itself—often used,

⁷ Bernard J. Hibbits, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 327 (1994).

⁸ *Id.*

⁹ See J.J. ROUSSEAU, A COMPLETE DICTIONARY OF MUSIC 257 (Willaim Waring trans., AMS Press, 2d ed. 1975) (1779) ("MUSIC, The art of combining sounds in a manner pleasing to the ear. This art becomes science . . . when we attempt to find principles of these combinations . . .").

¹⁰ See *id.*

though not a defining necessity—is arcane and can be read by some but not all; that musical notation is learned in the same way that we learn “how to read a case.”¹¹ In short, there is, in both, often, though not always,¹² a text, which can and must be interpreted.

Third, both law and music build on the past, so that ideas of development of doctrine can be found in both. In law, precedent not only suggests a binding rule to be applied to new cases, but also involves development of doctrine when used to control new situations. Thus, one could write a paper on “The *Dies Irae* as Movie Music”¹³ or on the subject “Anticipations of Mozart’s *Die Zauberflöte* in Handel’s *Rinaldo*.”¹⁴ In law, we begin law students on lines of cases which reveal the development of an idea, for example, strict liability in tort or promissory estoppel.

Perhaps in both law and music there are fictional aspects, the evocation of the antique, so that we see in Respighi or Carl Orff a deliberately archaic sound. We have legal ideas that claim to be old but in fact are not.¹⁵

Another perspective recognizes substantive connections between law and music. Thus, law involves regularity and generalization, and music similarly involves order, rules for composition, and harmony.

While music may not have substantive, let alone political content in theory, much music, like law, has substantive and even political content in fact. This can be illustrated in various ways. The folk song tradition is filled with examples of “songs of protest”: Geordie will hang for killing the king’s deer, someone follows the drinking gourd to freedom, using the legendary map of the underground railroad for American slaves.¹⁶ Later ethnic material also evidences the political song, including the

¹¹ Musical literacy was once much more assumed than it is today. See generally CLAUDE LEVI STRAUSS, LOOK, LISTEN, READ (Brian C.J. Singer trans., 1997).

¹² Improvisation suggests this qualification, as does the unpublished opinion.

¹³ See Andy Trudeau & Liane Hansen, *Movie Music: Amistad* (NPR broadcast, Mar. 1, 1998) (“The *Dies Irae* is one of those great shorthand things.”).

¹⁴ Indeed, these essays may exist. (Armida’s aria, “*Furie terribili!*” in GEORGE FRIEDRIC HANDEL, *RINALDO* 25 (1976), is apparently of the same genre as the most famous aria of the *Queen of the Night*.)

¹⁵ See generally Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). In law, perhaps someone is fooled. In music, everyone knows that the music is modern.

¹⁶ See generally A.L. LLOYD, *FOLK SONG IN ENGLAND* 33-35 (1967).

Gypsy account of life in modern Romania,¹⁷ or the description of the journey to Auschwitz of the Jewish community of Rhodes.¹⁸ Some of these seem to commemorate a past event, but the distinction between commemoration and present political statement collapses when, for example, we consider a song written in the early twentieth century, in which the text is the narrative of an old woman recalling the Fenian men of fifty years earlier.¹⁹

Certain forms of music have been useful to those who write about social and political institutions. In 1981 Robert Mnookin said that United States Supreme Court opinions sounded like a fugue.²⁰ Georg Simmel used a musical metaphor which distinguished between melody and key. Religion was a key in which a work was performed rather than a single melody.²¹ Michael Walzer recently invoked a musical image in his book *On Toleration*. "The voices are loud, the accents various, and the result is not harmony—as in the old image of pluralism as a symphony, with each group playing its own instrument . . . the result is a jangling discord."²² Another version of this image appears in the writing of Josiah Warren, once of New Harmony, who was interested in communitarian anarchism based on the idea of individual sovereignty. "I do not mean to be understood that all are of one mind," he said. "On the contrary, in a progressive state there is no demand for conformity. We build on *Individu-*

¹⁷ See LA MUSIQUE DES TSGANES DU MONDE DE L'INDE A L'ESPAGNE BANDE ORIGINALE DU FILM LATCHO DROM.

¹⁸ See ALHAMBRA: THE JOY OF JUDEO-SPANISH SONG (Koch Schwann Aulos 1993). For an example of radical folk songs, see REBEL VOICES: SONGS OF THE INDUSTRIAL WORKERS OF THE WORLD PERFORMED BY THE MEMBERS OF ENTERTAINMENT WORKERS IU 630, IWW (Flying Fish Records, Inc. 1992). See also R. SERGE DENISOFF, GREAT DAY COMING: FOLK MUSIC AND THE AMERICAN LEFT (1971).

¹⁹ "The bold Fenian men" dated from 1916. See RICHARD DYER-BENNET, *Liner Notes* to RICHARD DYER-BENNET 1 (Smithsonian Folkways) (1955).

²⁰ Mnookin wrote:

You can discern three distinct themes: First, that parents have primary responsibility to raise children. Second, that the state has special responsibilities for children, to intervene and protect them. And third, that children as people have rights of their own and have rights as individuals in relation to the family and in relation to the state. These themes are constantly in conflict.

Glenn Collins, *Debate over Rights of Children Is Intensifying*, N.Y. TIMES, July 21, 1981, at A1.

²¹ See GEORG SIMMEL, ESSAYS ON RELIGION 21 (Horst Jurgens Helle & Ludwig Nieder eds. & trans., 1997) ("[R]eligion would be analogous not to a single melody in the symphony of life, but to the key in which the whole work is performed.").

²² MICHAEL WALZER, ON TOLERATION 96 (1997). But Walzer asks, "who wrote the music?" *Id.*

ality; any difference between us confirms our position. Differences, therefore, like the admissible discords in music, are a valuable part of our harmony!"²³

While initially the art song seems less political—more oriented to private emotion and the life of the drawing room which supported it—the composed song in the hands of, for example, Modeste Moussorgsky, e.g., *Death the Commander*, or Gustav Mahler, e.g., *Drummer Boy*, carries a political message despite its association with high rather than popular culture. (A distinction which is hardly clear in any case²⁴). And perhaps there is some sense of victory in and over time through art. Tom Lehrer said of Franco and the Spanish Civil War: "Though he may have won all the battles, we had all the good songs."²⁵ That may be significant.²⁶

Certainly we can say that law is politics pursued by a particular means. This is true even on the private side. The political content of commercial law is, at moments, especially clear.²⁷

A particularly evocative metaphor for law is the contrast between the tempered and untempered scale. We cannot assume, Nietzsche wrote, that a listener can hear the difference between C sharp and D flat.²⁸ The idea of generality in law is paralleled by the idea of a well-tempered instrument.²⁹ Thus,

²³ Carol Weisbrod, *Towards a History of Essential Federalism: Another Look at Owen in America*, 21 CONN. L. REV. 979, 1001 (1989) (quoting J. NOYES, HISTORY OF AMERICAN SOCIALISMS 98 (1870-1966)); see also JOSIAH WARREN, TRUE CIVILIZATION: AN IMMEDIATE NECESSITY AND THE LAST GROUND OF HOPE FOR MANKIND 18 (Burt Franklin 1967) (1863) ("No subordination can be more perfect than that of an Orchestra; but it is all *voluntary*."). For an example of a unison singing, see SHAKERS OF SABBATHDAY LAKE ET AL., SIMPLE GIFTS: SHAKER CHANTS AND SPIRITUALS.

²⁴ See Gaynor Jones & Jay Rahn, *Definitions of Popular Music: Recycled*, 1977 J. AESTHETIC EDUC. 79.

²⁵ Tom Lehrer, *Folk Song Army*, in TOO MANY SONGS BY TOM LEHRER WITH NOT ENOUGH DRAWINGS BY RONALD SEARLE 96, 98-99 (1981). For a song as an actual dispute settlement, see Nettle's description of the "drum dance" of the Greenland Eskimos in BRUNO NETTL, MUSIC IN PRIMITIVE CULTURE 13 (1956).

²⁶ But see "Das ist die Ewige Kunst," in BRECHT-WEILL, AUFSTIEG UND FALL DER STADT MAHAGONNY 91 (1969) (describing the comment of Jack on hearing the sentimental piano piece *Maiden's Prayer*).

²⁷ See Peter Winship, *Lawmaking and Article 6 of the UCC*, 41 ALA. L. REV. 673, 698 (1990).

²⁸ See FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN 100 (R.J. Hollingdale trans., 2d ed. 1996).

²⁹ Otherwise there is much individualization, but something impossible to fit on one keyboard. See BELA BARTOK, ESSAYS 526 (Benjamin Suchoff ed., 1976) ("The exact English translation doing full justice to the authentic meaning of Bach's words ought to be: *Well-tempered Keyboard*."). Bartok writes as to Bach's work on the tempered scale:

temperament can be defined as a system of compromises in the tuning of pianos.³⁰

Another musical idea which could be useful in law would relate to popular forms, for example, the "round" as a popular version of a strict contrapuntal form.³¹ A history of such forms in music would be the parallel to the history of "unofficial" law in the main legal system. As Marc Galanter has pointed out, one of the questions a legal system has to decide is how to treat subordinate normative orders.³²

An examination of a song suggests we have at least four distinct elements: melody, text, arrangement, and performance. While the four elements could, in theory, be created by a single individual, in many cases we see four players: the creator(s), lost to history of the folk tune;³³ the writer of the text, i.e., a trained poet, the composer, or anyone else; the trained professional composer who, operating within the conventions of the discipline, writes the musical arrangement; and the performer who brings the work to an audience.

To the extent that we see analogues in law for these elements, we might say that the melody represents the ancient principles; the text, the narrative of the facts of the case; the arrangement, the application of the principles to the facts; and the performance, the opinion of the judge. Or we might say something else. The point is simply that the question is no longer a straightforward matter of the composer-performer of a single text.

Further, there can be multiple melodies, which might represent the principles of law, in a single piece. Not only the pre-

In the composition of his *Well-tempered Clavier* J.S. Bach's aim was to point to the enormous advantages of the tempered tuning, not yet generally accepted at that time, over the previous natural tuning. One of these advantages is that one can play with equal clarity in all the tonalities, whereas formerly this was possible only in those tonalities without key signatures or, at best, with simple ones. The consequence of the composer's aim is that he offers in each of the two volumes of his work twenty-four preludes and fugues representing in chromatic order the forty-eight major and minor tonalities.

Id. at 447.

³⁰ See J. CREE FISCHER, *PIANO TUNING: A SIMPLE AND ACCURATE METHOD FOR AMATEURS* 68 (Dover Publications 1975) (1907) (quoting Webster).

³¹ See, e.g., *Three Blind Mice*.

³² See MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* 255 (Rajeev Dhavan ed., 1989).

³³ The folk songs prompt questions like these: Does this have an author? Was anonymous a woman?

constitutional ideas³⁴ of a society, but the conflicting prefoundational ideas of distinct parts of the society, operating as melodies in different voices, present an expansion of a canonic idea in which the same melody is treated by different voices.³⁵

We might also note that other arrangements are possible for the four elements: thus, Gustav Mahler in *Des Knaben Wunderhorn* used folk texts and wrote his own music.³⁶ Art song texts can be those of anyone, including the composers. Sometimes the text is not identified clearly.

On the distinction between the composer and performer, we may find that composers can perform their own music, and thus we can have a composer in the role of a performer. Finally, it is not unusual for different composers to work with the same folk material. Thus, Beethoven and Moussorgsky used the same Russian folk tune, Beethoven in a *Razumovsky Quartet*,³⁷ Moussorgsky in *Boris Goudonov*.³⁸ Is this like different courts interpreting the same "principles" or passing on the same fact patterns?

The attempt of the Article is not to distinguish between uniformity (or unison) and variation, but rather between variation and polyphony. In the third section of Beethoven's *An Die Ferne Geliebte*, we hear a melody, supported by an arrangement treated as variations. This idea can be taken as a base line. The contrast is to more complex and interactive structures. Beethoven's *An Die Ferne Geliebte* serves to make two points. First, it illustrates harmony; and second, it shows that variation, or difference, is not at all inconsistent with the classical structured harmonic style.

Rousseau defined *harmony* as a "succession of concords according to the laws of modulation."³⁹ Rosen's description of modulation and chromaticism as structure in the classical period

³⁴ See generally Richard S. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

³⁵ For a comment on the idea of polyphony in relation to the visual arts, see MAURITS CORNELIS ESCHER, *ESCHER ON ESCHER: EXPLORING THE INFINITE* 20 (Janet Wilson ed. & Karin Ford trans., 1989) (relating the music of Bach to the idea of "the regular division of a plane into figures with identical forms"). For the suggestion that the art of Escher invokes Czerny more than Bach, see Roberta Smith, *Just a Nonartist in the Art World, But Endlessly Seen and Cited*, N.Y. TIMES, Jan., 1998, at E1.

³⁶ Mahler was perhaps responding to an invitation issued by Goethe. See Joseph Kerman, *An die ferne geliebte*, in *BEETHOVEN STUDIES* 123, 132 (Alan Tyson ed., 1973).

³⁷ Op. 59, no. 3, in C Major.

³⁸ See THE MUSORGSKY READER: A LIFE OF MODESTE PETROVICH MUSORGSKY IN LETTERS AND DOCUMENTS 332 (Jay Leyda & Sergei Bertensson eds. & trans., 1947).

³⁹ ROUSSEAU, *supra* note 9, at 187.

is evidenced by the seamless chord progressions of the homophonic, almost chorale-like style of the Beethoven art song example.⁴⁰ The theme is stated in the illustration from *An Die Ferne Geliebte* in a minor key and is then offered with several brief variations in the accompaniment. These variations are, however, not like the sort of interaction we term polyphonic. That is, the variations in the accompaniment (which are easily confirmed visually) do not suggest the existence of the dialogue between different and equivalent voices, which define the contrapuntal or polyphonic style, and which makes polyphony a particularly apt metaphor for pluralist interpretations of law.⁴¹

II. "CONTRAPUNTAL CONSIDERATIONS"⁴² THE ROLE OF THE FOLK ELEMENT

While there are various points of similarity and dissimilarity between law and music, there is one which seems to be of particular significance. Law and music each have official and unofficial aspects. Official law is the equivalent of classical music, which is the only music to many. Unofficial law, the law of groups other than the state, is like folk music.⁴³ The common question for each system is how the official system treats the unofficial material.

One answer to this question is sometimes put in terms of polyphony. What do we mean by polyphony in law? We might offer several possibilities. Sociologically, from the viewpoint of the observer, polyphony might be found in dissenting and majority opinions, though these might be viewed as alternatives, not really intended to sound together. They are, in this view, unlike musical polyphony, since in music the counterpoint is not simply a second-best resolution. From another point of view, it

⁴⁰ See ROSEN, *supra* note 6, at 26. Harmony itself is thus a complex idea. Charles Rosen indicates that harmony and dissonance are not, in fact, simple opposites. Tonal harmony may invoke modulation; modulation, at least in the eighteenth-century, "must be conceived as essentially a dissonance raised to a higher plane, that of the total structure." *Id.*

⁴¹ See 4 GROVES'S DICTIONARY OF MUSIC AND MUSICIANS 220 (H.C. Colles ed., 3d ed. 1928) ("Polyphony. The harmonious combination of two or more melodies, *i.e.* composition considered horizontally as distinct from Homophony, which is vertical in the principle of its structure.").

⁴² The phrase is the title of an article by John Renbourn. See John Renbourn, *Contrapuntal Considerations*, GUITAR PLAYER, June 1992, at 120. Renbourn stresses the importance of dealing with the separate lines.

⁴³ On unofficial law, see generally FOLK LAW: ESSAYS IN THE THEORY AND PRACTICE OF LEX NON SCRIPTA (Alison Dundes Renteln & Alan Dundes eds., 1994).

seems that they are responsive and perhaps even on a certain view of law and legal process, a necessity in the dialogic working out of ideas. Majority and dissent may have to be read against each other and are, in that sense, contrapuntal. One also finds polyphony in the legislative structure of the UCC, which, raising again old issues of egalitarianism and differentiation based on status, provides different substantive outcomes for different persons—people with different voices.⁴⁴

It is at this point that one considers folk music.⁴⁵ I want to avoid the attempt to define folk music and will use Bruno Nettl's idea that it is defined against high culture. The question is not what happens to the folk song itself, as it exists⁴⁶ outside the main system.⁴⁷ Rather, the inquiry focuses on different ways of treating the song within the main system. One might be looking to the folk element for various purposes, perhaps as a source of reform or change in the main system, perhaps to apply to an individual some system of personal law which he or she invokes, perhaps to interpret some document or, most generally, to acknowledge and reconcile another ordering system. This is, however, not the issue here; the focus is on how the material is used, rather than why it is used.

A common analysis of the connection between law and music stresses an author and a text. It is for this reason that we raise the issue of interpretation and the analogue to law. One way to look at this is to say that the legislature is the composer.⁴⁸ The art song treatment of a folk song complicates this picture considerably.

Beethoven arranged perhaps 150 Irish, Scottish, and Welsh folk songs for George Thomson as part of a project which Thomson had originated "to collect all the songs, plaintive and

⁴⁴ For example, see the merchant rules in the UCC.

⁴⁵ A contrast is sometimes made between primitive and folk music, the first relating to the music of cultures without a literate musical tradition, the second from a subgroup within a culture which has such a tradition. Bruno Nettl, while outlining the distinction and calling his book *Music in Primitive Culture*, also indicates that primitive music can be highly complex, e.g., Oriental music, the product of a nonwestern high culture. See NETTL, *supra* note 25, at 1-3.

⁴⁶ It may not even "exist" in this fixed way, e.g., Gypsy music, modified to fit the taste of the listener. See generally BALINT SAROSI, *GYPSY MUSIC* 199-200 (1978).

⁴⁷ Note the influence of main system on the subsystem.

⁴⁸ See generally Jerome Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COLUM. L. REV. 1259, 1264 (1947) ("The legislature is like a composer. It cannot help itself: It must leave interpretation to others . . .").

lively, of those countries."⁴⁹ Thomson only wanted the best composers and poets to work on the project. In fact, Haydn, as well as Burns, had worked on it for a number of years.

Beethoven's involvement began around 1809. One major obstacle was that Beethoven did not have texts to work from, and, despite repeated requests from the composer, Thomson failed to send a complete set.⁵⁰ A second complication was that Thomson wanted material that the young ladies of Scotland could play, and he thought that some of the settings were too difficult.⁵¹

The Beethoven folk songs can be sung by one singer and can be performed well with only a piano accompaniment. Indeed, as some have noted, one strength of these works is precisely that they are easily understood as short piano pieces.⁵²

However the settings often involve more participants; some of the works involve something which George Thomson understood as a conversation between voice and accompaniment, and some involve multiple voices. Here we can understand the folk song setting as, in a sense, polyphonic: several melodies, main and counter, and antiphonal features. The pieces take on the character of polyphony.

The folk song settings have been discussed with considerable appreciation. It has been noted that

In all his settings Beethoven took considerable trouble to avoid the obvious and create something unexpected yet effective. The introductions and codas often show great skill in developing some prominent motif from the melody Likewise in the harmonies he often risked something primitive or awkward, or alternatively introduced some subtle chromaticism, rather than lapse into conventionality. Thomson's verdict on the settings, noted on the fly-leaf of a large volume of them, is entirely valid: "Original and beautiful are these arrangements by this inimitable genius Beethoven."⁵³

⁴⁹ BARRY COOPER, *BEETHOVEN'S FOLK SONG SETTINGS: CHRONOLOGY, SOURCES, STYLE* 14 (1994).

⁵⁰ See *id.* at 11.

⁵¹ Thomson had written:

The Ritornellos and accompaniments of these nine airs are in general excellent; I have been ravished by them; but my dear sir, there are some which are much too difficult for *our* public. It is a fact that not one young lady in a hundred here will even look at the accompaniment of an air, if it is the least bit difficult.

Id. at 17.

⁵² See WILLIAM KINDERMAN, *BEETHOVEN* 200 (1995).

⁵³ THE BEETHOVEN COMPENDIUM: A GUIDE TO BEETHOVEN'S LIFE AND MUSIC 67

William Kinderman notes as to the settings:

As the publisher specified, the folk-song variations are of modest difficulty and provide an optional flute or violin part In essence, however, they are piano music of considerable subtlety that easily dispenses with the accompaniment. They deserve to be better known, and represent a not insignificant stage in Beethoven's evolving treatment of variation technique⁵⁴

Kinderman quotes Uhde as concluding that the folk song settings demonstrate that "nothing is too slight to serve as the point of departure for great music The most humble things can be illuminated to reveal a deeper meaning."⁵⁵ Thus, one is not surprised to hear a tiny echo of *Farewell Bliss and Farewell Nancy* in the *Kreutzer Sonata*.⁵⁶

Of course, performances are different. The Beethoven settings were designed for amateur performers, although musical literacy, at least at a minimal level, is assumed. And the fact that balladeer Richard Dyer-Bennett⁵⁷ did a performance of the settings of a "classical" composer is not unique.⁵⁸ We should note, however, that some of the reviews of the Dyer-Bennett effort are distinctly cool.⁵⁹ These cannot be performed as simple folk songs anymore: a folk song by Beethoven is different.

When two composers associated with high culture set the same melody to different texts, at what are we looking? To the extent that the text exists, one might ask initially whether this is about a story, not about music at all. How would this be different if it were about a story? We would then ask: What does polyphony look like in texts? In the characters? In the readers? In the writer? But a folk song to a text, while it tells a story, like program music which tells a story, is more than a

(Barry Cooper ed., 1991) (quoting E. BARTLITZ, DIE BEETHOVEN-SAMMLUNG IN DER MUSIKABTEILUNG DER DEUTSCHEN STAATSBIBLIOTHEK 67 (1970)). But see A.L. LLOYD, *supra* note 16, at 33-35. Beethoven and Haydn "made a hash" of the job of arranging folk songs.

⁵⁴ KINDERMAN, *supra* note 52, at 200 (1995).

⁵⁵ *Id.*

⁵⁶ See *Gluck und Lieb' Verloren—Farewell Bliss*, in BEETHOVEN, SCOTTISCHE LIEDER (AUSWAHL) 10 (1890).

⁵⁷ He did not refer to himself as a folksinger. His contribution to folk music has been, however, acknowledged.

⁵⁸ See, e.g., THE GLENN GOULD READER 311 (Tim Page ed., 1984) (praising Barbra Streisand's performance of a classical repertoire).

⁵⁹ See IRVING KOLODIN, THE NEW GUIDE TO RECORDED MUSIC 62 (1950). Irving Kolodin noted that, while Dyer-Bennett was "[a] qualified minstrel for the music with which he is usually content," he was wanting in the "vocal resources to deliver this music in the best manner." *Id.*

story.

For example, Beethoven's *Dermot* is one half of a conversation between lovers.⁶⁰ The woman berates the man for taking a bribe. Benjamin Britten wrote a very different setting of the same melody, to a martial text, which begins "Avenging and bright fall the swift sword of Erin" and ends with a reference to revenge on a tyrant.⁶¹ I do not know if Beethoven had any text.⁶² Britten used the original text.⁶³

Are these settings the same "song"? The melody seems to have been entirely transformed, though its notational outline remains the same. The *Dermot* setting by Beethoven introduces contrapuntal movement. The Britten setting, with its clear distinction between melody and supporting arrangement, is more like the *An Die Ferne Geliebte* base line. Is this something like a doctrine changing (typically over a good deal of time in law, in an instant in music)? Does the doctrine constrain the text in law? In music? Is it more difficult for a judge to reshape a doctrine than for a composer or poet to write another twenty verses of *Greensleeves*?

The almost literal analogues in law of the Beethoven and Britten treatments of the same song might be the shift in the understanding of the doctrine of equitable estoppel. The doctrine (melody) is used as a shield, as Nora shields and advises Dermot, and also, in section ninety of the *First Restatement of Contracts*, as a sword in the form of promissory estoppel as a theory for the enforcement of promises.⁶⁴

Is this also something like the transformation of the holder in due course doctrine, when it moves from the nineteenth-century commercial to the twentieth-century consumer context? The doctrine began in a world in which multiple transfers were

⁶⁰ See LUDWIG VON BEETHOVEN, *Oh! Who, My Dear Dermot*, in 1 TWELVE IRISH AND SCOTTISH SONGS 14-15 (Richard Dyer-Bennett ed., 1947) ("Oh! who, my dear Dermot, has dar'd to deceive thee, / And what's the dishonour this gold is to buy? / Back, back to thy tempter, or Norah shall leave thee, / To hide her in woods, and in deserts to die.").

⁶¹ 4 BENJAMIN BRITTEN, *Avenging and Bright (Crooghan a venee)*, in 4 FOLK SONG ARRANGEMENTS: MOORE'S IRISH MELODIES 1 (1960) ("Avenging and bright falls the swift sword of Erin / On him who the brave sons of Usna betrayed! / For ev'ry fond eye which he waken'd a tear in, / A drop from his heart—wounds shall weep o'er her blade.").

⁶² See *supra* note 50 and accompanying text.

⁶³ See JOHN STEVENSON & HENRY BISHOP, *MOORE'S IRISH MELODIES WITH SYMPHONIES AND ACCOMPANIMENTS* 104 (Michael Glazier 1981) (1891) (The title apparently referred to the ancient Fenians.).

⁶⁴ This is a subject of the first year contracts course. See generally Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984).

normal and functional. It was not unreasonable to insulate a remote good faith purchaser from most problems in the underlying transaction. When multiple transfers became uncommon, the holder in due course doctrine came to be seen as a consumer abuse.⁶⁵

With this as the foundation for a connection, we still need some detail on how the folk material is used in law. Here, we can adopt a set of distinctions offered by Charles Rosen in *The Classical Style*. Rosen notes that when Bach uses a folk song, it is either as a quotation from a foreign language or a subject which is transformed, so modified in execution that it is no longer what it originally was.⁶⁶ He illustrates the latter with the baroque treatment of chorale tunes, "which, if not folk music, had become folk property long before Bach. The chorales are, indeed, completely assimilable into the Baroque style, but only because their original rhythms had, in time, been thoroughly flattened into an almost totally uniform movement."⁶⁷ Rosen stresses that "[n]ot only the original dance rhythms have been destroyed in the early eighteenth-century chorale, but even the inflections of speech have largely disappeared."⁶⁸ By contrast, says Rosen, when Haydn uses a folk tune, it is "fused" with the high cultural approach, so that, in effect, it is both itself and something else.⁶⁹ This, Rosen suggests, is also true of Beethoven's *Ninth Symphony*. And perhaps it is also true of the Beethoven folk song settings.⁷⁰ The three categories are, then, quotation, transformation or distortion, and fusion.⁷¹

While the first category seems to stand by itself, since it treats the folk element as altogether foreign to the main system,

⁶⁵ See generally Grant Gilmore, *On Statutory Obsolescence*, 39 U. COLO. L. REV. 461 (1967).

⁶⁶ See ROSEN, *supra* note 6, at 330.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 330-31.

⁷⁰ Of course, I do not know what Charles Rosen would conclude about this.

⁷¹ For a very different idea of fusion, see the comment of Gábor Egressy made in 1848: Some people think that this principle [i.e., of nationalism] is in contradiction with the principle of humanity, of duty toward mankind and of cosmopolitanism: they think that it means isolation, misanthropy, and that it is impossible to exist among other nation-families; they think that nations should rather move toward fusion. What nonsense! This is nothing else than to desire that the individual should disappear from nature, that colors should blend together . . . whereas it is precisely in the variety of individual existences that the infiniteness of God expresses itself.

the second two categories may, in some cases, involve substantial overlap. One might intend an assimilation in which the folk element survives visibly, yet be seen, especially by another generation, to have accomplished a virtual destruction of the folk element by an illegitimate appropriation or cooption.

The quotation approach might be variously illustrated, but I would use the arms-length descriptions of the religious or ethical cultural traditions, which are litigated under the Free Exercise Clause. These are "in" the legal materials, but only as quotation.

The second category, transformation or distortion which involves a serious modification of the folk material, might be illustrated by any case involving an individual rights claim instigated by a person who is part of a group which is not committed to individualism in the western sense, but rather sees the individual as standing in a context of communal affiliations and claims. The form of the litigation requires a stance which is not in fact the stance of the group or the member and is in some ways assumed for the purpose of the lawsuit. The folk material is recognizable, but there is also something odd about it.⁷² *Wisconsin v. Yoder*⁷³ is such a case. The idea that the case involves "parents' rights" is true. But this is not a sufficient description of the actual setting of the problem as it would be understood in the "folk" tradition itself, which does not operate in terms of individual rights claims. In this case, the parents represented not their own individual interests, but the claims of a community.⁷⁴

The transformation-distortion idea might also be illustrated by the history of the jury: once a group of neighbors who knew the facts, now a group of "peers" who are disqualified if they know the facts.

The third category, fusion, may be illustrated with material from the UCC. We might recall Llewellyn and his thinking on the issue of folk. James Whitman notes that:

Of course, Llewellyn borrowed directly, not from Romantic criminal law thought, but from Romantic commercial law

⁷² This is not, of course, a description of litigation in which the individual asserts claims against the group in the state system.

⁷³ 406 U.S. 205 (1972) (holding that the Free Exercise Clause requires exemption of Amish children from two years of high school).

⁷⁴ See William B. Ball, *First Amendment Issues*, in *THE AMISH AND THE STATE* 256 (Donald B. Kraybill ed., 1993) (showing why *United States v. Lee*, 455 U.S. 252 (1982), was not in the same sense an "Amish" case).

thought. Nevertheless, Romantic commercial law thought very much belonged to the "immanent law" tradition associated with the criminal jury. Indeed, the later decades of the Romantic movement saw the growth of a remarkable conviction that commercial codification could satisfy the nationalistic yearnings of German lawyers.⁷⁵

Kamp has noted that:

As the native Alaskans created beautiful objects of folk art, merchants have created beautiful and functional mercantile practices, such as the C.I.F. contract used in international marine shipping. The merchant rules, then, are similar to the law codes Llewellyn proposed for the Native Americans; they are functional and beautiful rules proposed for a discrete group. Specialized groups need specialized rules; rather than create rules of general application, rules should be tailored to the particular characteristics and needs of the group. So the folk song, the C.I.F. contract, and the Grand Style of the Common Law Tradition, are all practices that have stood the test of time and have evolved in good and beautiful ways. Group practices are good and should be practiced and enforced against dissidents.⁷⁶

But in fact the fusion is not always perfect. One example is section 2-207 of the UCC. "Battle of the Forms" is a popular name for the situation in which, typically, documents prepared by the two parties to a contract do not match, so that a common law offer and acceptance (which required that the offer and acceptance "mirror" each other) does not result. Two separate questions arise: Is there a contract? If so, what are its terms? The battle of the forms is a real life problem. As is generally true in Article 2 of the UCC, there is an underlying idea of real world expectations and practices. But the solution is not easily workable. Grant Gilmore concluded, in a letter to Robert Summers, that it was a botched drafting job and ought to be taken "cheerfully."⁷⁷

Recalling the Dyer-Bennett performance,⁷⁸ we might conclude that it takes a trained voice to fully deliver the Beethoven folk song settings because the simple line, when juxtaposed against the classical arrangement, calls for something other than

⁷⁵ James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 162 (1987).

⁷⁶ Kamp, *supra* note 3, at 357-58 (footnotes omitted).

⁷⁷ Letter from Grant Gilmore to Robert Summers, in RICHARD E. SPEIDEL ET AL., *TEACHING MATERIALS ON COMMERCIAL AND CONSUMER LAW* 54-55 (3d ed. 1981) (quoting Arthur Corbin).

⁷⁸ See *supra* notes 57-59 and accompanying text.

a folk or ballad sound. Thomson's complaint that the Beethoven settings were too difficult for the Scottish young ladies to play is also perhaps a lesson for the law's use of folk material. When the law incorporates the folk element, it runs the risk of producing something too difficult for performance by the "folk" or, perhaps, by almost anyone.

Professor Milner Ball invokes Mikhail Bakhtin's use of polyphony and relates it to American law:

Polyphony in narrative is the representation "of human 'languages' or 'voices' that are not reduced into, or suppressed by, a single authoritative voice: a representation of the inescapably dialogical quality of human life at its best." This affective representational capacity accounts for the fundamental sympathetic relation between the aesthetics of narrative and the dynamics of the American legal order.⁷⁹

The pianist, Glenn Gould heard music in speech, and if we need a transition between a musical work and the speech patterns of law, we might consider a vocal symphony in two languages as heard by Glenn Gould:

The atmosphere in the restaurant is calm but full of voices. A dozen simultaneous conversations create a low rumble in the room. A single voice cuts through this mass of voices and Gould turns to look. At another table, three truckers—one about fifty, the others younger—are sitting across from one another. We focus on this conversation, and soon the rumble of voices dies away artificially so that we can hear more clearly.

....

Gould's attention is drawn to the beleaguered waitress at the counter. She is calculating bills and trying to deal with a troublesome but harmless regular sitting next to her. Their voices are superimposed onto the first trucker's, and are often heard simultaneously. This blend of voices begins to form a rhythmic, contrapuntal pattern.⁸⁰

Gould's sense that speech is music is perhaps more than we can accommodate. Finally, law is not music any more than it is poetry or fiction. But it might be strikingly like some music, particularly fusion folk.

It has been said that guitarist John Renbourn "put 'folk-

⁷⁹ Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2290 (1989) (footnote omitted).

⁸⁰ FRANCOIS GIRARD & DON MCKELLAR, 32 SHORT FILMS ABOUT GLENN GOULD 86 (1995).

baroque' on the map through work with the folk-rock group, Pentangle. . . . Pentangle pioneered the fusion of folk melodies and jazz improvisations. But Renbourn has always infused his music with other influences, including country blues, ragtime, classical, Middle Eastern and pre-Renaissance music."⁸¹ The reference to fusion in this description allows the use of Renbourn for the musical representation of fusion folk. One commentator noted that John Renbourn's "repertoire may stretch back to 1502 as he claims, but his treatment of it is decidedly of the moment."⁸² A particularly absorbing example is Renbourn's arrangement of *My Lady Carey's Dump*, a short work from the early sixteenth-century.⁸³ The original work is for keyboard, though alternate instrumentation is also suggested.⁸⁴

A contrast should be noted between Renbourn's arrangement of a traditional dump and the sense of Glenn Gould that there is polyphonic music in ordinary group speech. Theoretically, music in group speech could exist in any setting, with any number of participants, as long as it was marked by a beginning and an end. Whatever speech happens in this six minutes is taken to be music. All the speech is different, all interacting, and thus it is musical polyphony.

Renbourn's piece, *Variations on My Lady Carey's Dump*, is quite different. It is a textured ordering of quasi-antiphonal exchanges (some conceivably improvised) and delicate percussive effects—both particularly pronounced through headphones—supported by the fixed lines of the tonic—dominant and unified by the melodic line of the traditional dump.⁸⁵ The Renbourn dump is six minutes of a highly complex instrumental

⁸¹ Anthony DellaFlora, *Tracing Ancestral Musical Roots*, ALBUQUERQUE J., May 5, 1995, at E20.

⁸² Rob Adams, *Old as New: John Renbourn and Isaac Guillory, Old St. Paul's Church, Edinburgh*, HERALD (Glasgow), Mar. 17, 1993, at 6.

⁸³ See JOHN RENBOURN, *Variations on My Lady Carey's Dompe, on THE NINE MAIDENS* (Transatlantic Records 1985); John Ward, *The "Dolfull Dumps"*, 4 J. AM. MUSICOLOGICAL SOC'Y 111 (1951); see also Jeremy Barlow, *Liner Notes to SOPHIE YATES, ENGLISH VIRGINALS MUSIC 5* (Chandos Records 1995):

This is one of the very few pieces in the English virginals idiom surviving from the first half of the 16th century. It is based on a tonic/dominant left hand broken chord ostinato, with a right hand melody which includes quasi-extemporised divisions owing more to lute technique than the potential of the keyboard. The music probably reflects a vernacular method of extemporising which was not normally written down

Id.

⁸⁴ See EDWARD W. NAYLOR, *SHAKESPEARE AND MUSIC* 127-28, 207-08 (1896).

⁸⁵ This work is referred to as a guitar and recorder duet, see Jas Obrecht, *John Renbourn The Nine Maidens*, GUITAR PLAYER, Aug. 1986, at 135, but there are clearly other instruments involved. I am reluctant to guess at the instrumentation on the Renbourn

is six minutes of a highly complex instrumental interaction, founded on the commitments and givens of the structure. It seems to me to provide a metaphor for a pluralist vision of law.

CONCLUSION

The idea that there is a relationship between music and the state is ancient. We see discussion of the relationship at various points in Plato's *Republic* and *Laws*.⁸⁶ The theme was revived, for example, by Molière, "There is nothing so useful in a state as music." The music master in Molière's *Bourgeois Gentilhomme*, echoes a Greek text. But what kind of music? In Plato, the idea is that music reinforces a sense of order and harmony.⁸⁷ Thus only certain kinds of music will be useful, and too much music of the wrong kind will in fact be counterproductive.

As noted, Renbourn's variations are not simply anything at all that happens in the six minutes. They are rather, a composition built on an old form in which different parts interacting do different things within boundaries. We have a composer, as we have with the Beethoven folk songs, who builds on things which were not composed by him. Some of the work may be improvised under a composer's instruction that says: "improvise here."⁸⁸ Some of it is given, and very old. It might be like the Statute of Frauds, an Elizabethan statutory base to which several centuries of accretion and elaboration have been added, though with all this difference and all this variation, the composition holds together and remains one thing. Or it might simply be like "law" itself, the seamless web across time.

* * *

Why pursue the inquiry into law and music in this way? Indeed, why metaphor at all? One answer, conventionally, is

work. A sample of the possibilities can be gotten from the credits on another album released a few years earlier by the John Renbourn Group, *Live in America*, in which we hear guitar, flute, krumhorn, northumbrian small pipes, dulcimer, mandolin, fiddle, tabla, and finger cymbals.

⁸⁶ See PLATO, THE LAWS 290-91, 303-06 (Trevor J. Saunders trans., 1970); PLATO, THE REPUBLIC OF PLATO (Allan Bloom trans., 2d ed. 1991).

⁸⁷ Ordinarily this refers to citizenship training. Is there an echo of this idea in the fictional role of music in communicating with alien cultures? See generally FRED HOYLE, THE BLACK CLOUD (1957); CLOSE ENCOUNTERS OF THE THIRD KIND (1977).

⁸⁸ See JOHN RENBOURN, *Liner Notes to Sidi Brahima*, on THE RENBOURN GROUP, THE ENCHANTED GARDEN (Shanachie Records 1990) ("The tune . . . has arranged sections and improvised sections.").

that there is at times a risk in speaking too directly,⁸⁹ so that metaphor becomes a form of esoteric writing. But we also use metaphors for the opposite purpose. We want to speak very directly, very clearly, about law as part of culture. Breaking through the law's "autonomous" categories by talking about music seems to be one way to do that.

But it is also worth noting the limits of the metaphoric enterprise. When one invokes musical illustrations and says they are about an idea, it seems that the value of the illustrations is tested by their utility in communicating that idea to an audience. At this point one is talking about law and not about music. In law, the generalization, the idea, the abstraction, is an essential aspect of the enterprise. As the opening lines from Adorno suggest, it is at this moment, in music, that one has reached the issue of transcendence.

⁸⁹ See GEORGE STEINER, ERRATA: AN EXAMINED LIFE 115 (1997) (quoting Borges) ("Censorship is the mother of metaphor.").